Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

UNITED STATES OF AMERICA ex rel.

TOM U. CHOE,

Petitioner,

vs.

JERRY GILMORE, Warden,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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100 pp

(1a) QUESTIONS PRESENTED

1. Whether defendant State prisoner's right to counsel on direct appeal includes the right to have counsel advise him that the appellate court has affirmed his conviction - to enable him to take future available legal action before it becomes time-barred. [This is a matter of apparent first impression.]

2. Whether the loss of opportunity for habeas review of one's federal constitutional claims, due to ineffective assistance of appellate counsel as per Question 1 above, is "cause and prejudice" for the default, authorizing habeas review on the merits though the merits of the claim were not reached by the State courts.

3. Whether the Court of Appeals should have granted certificate of appealability to review the District Court's dismissal of defendant's habeas petition raising the above issues.

1(b) PARTIES INVOLVED

Petitioner, Tom U. Choe, was the Petitioner in the U.S. District Court for the Northern District of Illinois, and Petitioner-Appellant in the U.S. Court of Appeals for the 7th Circuit.

Respondent, Jerry Gilmore, Warden, was the Respondent in the U.S. District Court for the Northern District of Illinois, Eastern Division, and Respondent-Appellee in the U.S. Court of Appeals for the 7th Circuit.

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1(d) Judgment Below

The District Court, via unreported orders, denied habeas relief on February 13, 1998 (App. A, App. 1-20), and denied certificate of appealability on May 19, 1998. (App. B, App. 21-29)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Tom U. Choe, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the 7th Circuit, allowing to stand, by denying certificate of appealability and petition for rehearing, the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, denying his petition for writ of habeas corpus - by which habeas action he sought relief from his conviction for murder and sentence of 60 years.

Judgment and Orders Below

The Judgment sought to be reviewed

is the Memorandum Opinion and Order of the District Court dated Feb. 13, 1998, denying habeas relief (App. A, App. 1-20) and the Memorandum Opinion and Order of the District Court dated May 19, 1998 denying certificate of appealability (App. B, App. 21-29), which the 7th Circuit permitted to stand when it denied certificate of appealability on Aug. 6, 1998 (App. C, App. 30-31) and denied rehearing with suggestion for rehearing en banc on Sept. 25, 1998. (App. D, App. 32-33) All of these Orders are unreported.

Jurisdictional Statement

On September 25, 1998, the Court of Appeals issued its Order (App. D, App. 32-33) denying petition for rehearing with suggestion for rehearing en banc,

thereby allowing to stand its Order (App. C, App. 30-31) of August 6, 1998 denying certificate of appealability, which allowed to stand the judgment of the District Court denying habeas on Feb. 13, 1998 (App. A, App. 1-20) and denying certificate of appealability on May 19, 1998 (App. B, App. 21-29).

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rules 10, 12 and 13 of this Court.

Basis for Federal Jurisdiction

Jurisdiction in the District Court is based on 28 U.S.C. § 2254(a).

Constitutional Provisions

The 6th Amendment to the U.S. Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The 14th Amendment to the U.S. Constitution provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner, Tom U. Choe, an Illinois State prisoner (hereafter, defendant), sought to appeal from the District Court's judgment denying his petition for a writ of habeas corpus, in which defendant raised, *inter alia*, the claim that he was denied effective assistance of trial counsel and appellate counsel on direct appeal. The District Court denied habeas in a

Memorandum Opinion and Order (App. A; App. 1-20), and also denied Certificate of Appealability. (App. B, App. 21-29) The 7th Circuit denied petition for certificate of appealability (App. C, pp. 30-31) and denied rehearing (App. D, pp. 32-33).

STATEMENT OF FACTS

Defendant was found guilty by a jury of murder and sentenced to 60 years, and the Illinois Appellate Court affirmed. People v. Choe, 230 Ill.App.3d 438, 595 N.E.2d 99, 172 Ill.Dec. 36 (1 Dist. 1992). Lone eyewitness Gloria Santiago specifically testified that **she never told the police defendant was the person who did the shooting.** (Tr. 35, 45) She only said the photo "resembled" the assailant she

saw. (Tr. 35) To her, "all Chinese men are the same to me and I really cannot make the difference . . ." (Tr. 36)

Claiming lack of culpable negligence for late filing - his appellate counsel never notified him of the affirmance - defendant filed a Petition under the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1, et seq. alleging ineffective assistance of trial and appellate counsel; the court summarily dismissed it as "frivolous/ patently without merit" and as untimely. The Appellate Court, People v. Choe, No. 1-94-4073, February 20, 1996 (unpublished Order), affirmed the Circuit Court's order dismissing the PC petition without hearing, and the Illinois Supreme Court

denied Leave to Appeal. (No. 81037, denied October 2, 1996.) Additional facts are set out in the Argument below.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted so that this Court may review and establish the following propositions:

I. A State Criminal Defendant's Right to Counsel on Direct Appeal Includes the Right to Have Counsel Advise Him That The Appellate Court Has Affirmed His Conviction, to enable him to take future available legal action before it becomes time-barred. ***[A Matter of Apparent First Impression]***

II. The loss of opportunity for habeas review of one's federal constitutional claims, due to ineffective assistance of appellate counsel as per Question 1 above, is "cause and prejudice" for the default, authorizing habeas review on the merits though the merits of the claim were not reached by the State courts.

III. The Court of Appeals should have granted certificate of appealability to review the District Court's dismissal of defendant's habeas petition raising the above issues.

Here, the U.S. District Court held that the failure of counsel on direct appeal to advise defendant that his conviction has been affirmed, so that his time to file a State Post-Conviction Petition elapsed, causing a procedural default that prevents defendant from achieving federal habeas review on the merits of his claims of violation of federal constitutional rights.[1]

In denying habeas relief, the District Court stated:

> "Petitioner's only proffered reason for his untimeliness [in filing his State Post-Conviction] is his [direct appeal] counsel's failure to inform him that his conviction was affirmed. As petitioner had no right to counsel at that time, this does not amount to 'cause,' which requires an external objective

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[1] Defendant here claims actual innocence. See fn. 5, p. 23, infra, and App. E, App. 34-57.

> factor such as 'interference by officials or the unavailability of the factual or legal basis of a claim' to have impeded a petitioner's compliance with state procedural rules. Barksdale [v. Lane, 957 F.2d [379] at 385 [(7th Cir. 1992)] (citing Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)." (App. A, App. 19-20)

In denying Petition for Certificate of Appealability, that Court stated:

> "Although the court held that this claim did not raise a constitutional issue because there is no right to counsel after the first appeal, petitioner claims that his right to counsel on appeal extends through the disposition of that appeal so that a defendant may determine what further action to take. [footnote omitted]
>
> The court is not persuaded by this argument, which is merely an attempt to extend the right to counsel further than the constitution requires." (App. B, App. 23-24)

The District Court is wrong, and the Court of Appeals was wrong in

denying certificate of appealability and rehearing as well. (Apps. C & D, App. 30-33) Certiorari should be allowed so that this Court may review the situation and establish the proposition - a matter of apparent first impression - that:

I. One's Right to Counsel on Direct Appeal Includes the Right to Have Counsel Advise One That The Appellate Court Has Affirmed The Conviction.

Appellate Counsel's omission in not notifying defendant of the result of his direct appeal, violated defendant's right to effective assistance of counsel on appeal - as guaranteed by the 6th Amendment to the U.S. Constitution, and also by the due process clause of the 14th Amendment of the U.S. Constitution - when judged by this Court's 2-prong test of Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984).

Here, the ineffectiveness did not occur during a collateral proceeding, but during the direct appeal process.

This Court has held that defendant has a right to effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821 (1985). We ask this Court to hold - as a matter of apparent first impression - that **The right to counsel during the direct appeal includes the right to have counsel advise of the date and result of any affirmance**.

This position is supported by standards as set by the legal profession for counsel's obligation to a client. See ABA Model Rules of Professional Conduct, Rule 1.4 (1996), and the identical Illinois Rule, Illinois Rules

of Professional Conduct [Ill. RPC].

Both ABA Rule 1.4 and Ill. RPC Rule 1.4 provide:

> "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

This right - to be advised of the result on appeal - is comparable to a defendant's right to have counsel notify defendant of the prosecutor's offer of a plea bargain. In that context, counsel's failure to communicate a plea offer to a defendant, or to properly discuss that offer with the defendant, is a denial of effective assistance of counsel. Boria v. Keane, 99 F.3d 492 (2

Cir. 1996); United States v. Day, 969 F.2d 39, 43 (3 Cir. 1992); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3 Cir. 1982); United States v. Rodriguez Rodriguez, 929 F.2d 747, 752 (1 Cir. 1991); Turner v. Tennessee, 726 F. Supp. 1113, 1117 (M.D. Tenn. 1989), *aff'd*, 940 F.2d 1000 (6 Cir. 1991).

The defect of performance here occurred during counsel's representation on direct appeal, and prejudiced defendant because it prevented him from filing a timely Illinois Post-Conviction Petition. The Illinois Appellate Court used this excuse (untimeliness of filing) as a reason for not considering the merits of defendant's constitutional claims in the State Post-Conviction Proceeding and in the appeal from denial

of State PC relief. This, in turn, was used by the District Court as a reason for denying habeas relief. If this is not "cause" and "prejudice," what is? The loss of the opportunity to have one's federal constitutional claim considered on the merits in a federal habeas action due to inaction by appellate counsel, is "cause and prejudice" in habeas jurisprudence. (See pp. 18-23, infra.) This is the **exception** to Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986), as applied in U.S. ex rel. Barnard v. Lane, 819 F.2d 798, 801-02 (7 Cir. 1987). (See pp. 20-22, infra.)

The Illinois PC statute timely-filing requirement is regulated in part as to end of direct appeal. It reads:

> "No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the sate for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c).

Because defendant here was not told by his appeal lawyer that his conviction had been affirmed on direct appeal, defendant could not timely comply with this statute. Cf. Baker v. Kaiser, 929 F.2d 1495, 1499-1500 (10 Cir. 1991).[2]

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[2] There, where appointed counsel failed to contact incarcerated defendant during 10-day period after sentencing within which notice of appeal was due,

(continued...)

To hold there is no cause and prejudice here on grounds that defendant has no right to effective assistance of counsel in collateral attack (i.e., in State PC proceedings) is illogical, because the ineffectiveness of counsel here occurred **during the process** of **defendant's direct appeal.**

The failure to convey crucial information to a client - the result of a direct appeal of a State criminal conviction, no less than a plea offer in the pre-trial phases - must be a violation of the constitutionally

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[2](...continued)
defendant "did not receive professional assistance [of counsel] so that he could make an informed decision about whether to pursue a direct appeal"; habeas allowed unless State courts provide him with out-of-time appeal within reasonable time.

guaranteed right to counsel, because, as defendant's advocate, **counsel is the means by which defendant receives notice, and is given the opportunity to defend - THE ESSENCE OF DUE PROCESS OF LAW**. Notice and the opportunity to be heard and to defend are the essence of due process of law. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 873 (1950); Fuentes v. Shevin, 407 U.S. 67, 90 n.21, 32 L.Ed.2d 556, 575 n.21 (1972).

The District Court's denial of habeas relief, and the orders denying him the opportunity to obtain federal appellate review of such denial - all result in defendant's **loss of the opportunity for ANY FEDERAL REVIEW of**

his well-pleaded constitutional claims,[3] deny him such essential due process.

II. The loss of opportunity for habeas review of one's federal constitutional claims, due to ineffective assistance of appellate counsel as per Question 1 above, is "cause and prejudice" for the default.

The deficient performance of counsel on direct appeal of not advising defendant of the result of the direct appeal, prejudiced defendant, because he could not take timely action as to another remedy, that is, his State post-conviction petition. This, in turn, kept the federal courts from ever addressing the merits of his constitutional claims. Surely, this amounts to "cause" and "prejudice" for not raising the issues in State court.

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[3] See fn. 5, p. 23 & fn. 6, p. 24, infra, and App. E, App. 34-57.

Compare Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986).[4]

The procedural default rule must not be used in such a hypertechnical fashion as to deprive a habeas petitioner of fundamental fairness (a/k/a due process of law). This Court has held that rules of procedural default "will not prevent federal habeas

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[4] See also constitutional principles in Wright v. Gramley, 125 F.2d 1038, 1043-44 (7 Cir. 1997), and Porter v. Gramley, 112 F.3d 1308, 1317 (7 Cir. 1997), recognizing that "prison is a difficult place from which to litigate . . . ," Wright, at 1043, citing United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1016 (7 Cir. 1987), and requiring a federal evidentiary hearing "'if a habeas petitioner alleges facts which, if proved, would entitle him to relief and the state courts--for reasons beyond the control of the petitioner--never considered the claim in a full and fair hearing.'" Wright at 1044, quoting Porter v. Gramley at 1317.

courts from ensuring the 'fundamental fairness [that] is the central concern of the writ of habeas corpus.'" Murray v. Carrier, 477 U.S. 478, 496, 91 L.Ed.2d 397, 414 (1986), quoting from Strickland v. Washington, 466 U.S. 668, 697, 80 L.Ed.2d 674, 700 (1984).

Murray v. Carrier, supra, routinely utilized by habeas respondents and federal courts in support of the "cause and prejudice" rhetoric as used against defendants (e.g., App. A, App. 20), itself involved a case where petitioner

> "has never alleged any external impediment that might have prevented counsel from raising his . . . [substantive] discovery claim in his [State] petition for review, and **has disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim**." 477 U.S. 478, 497, 91 L.Ed.2d 397, 414. (Emphasis added.)

In the present case, by way of contrast, ineffective assistance of counsel on appeal **is** claimed.

In U.S. ex rel. Barnard v. Lane, 819 F.2d 798, 801-02 (7 Cir. 1987), though the issue of ineffective assistance of trial counsel was waived in the Illinois appellate court, the magistrate found, and the reviewing court agreed, "that the cause for this default was that Barnard was denied the effective assistance of appellate counsel." Id. at 801. The Court of Appeals continued:

> "The magistrate also found that Barnard was prejudiced by the default because he was denied a full review of his constitutional claims. Finding adequate cause and prejudice to overcome the waiver doctrine, the magistrate went on to consider the merits of Barnard's claim of ineffective assistance of counsel." Id. at 801.

The Court of Appeals, finding that the magistrate correctly applied the law to the record before him, therefore adopted his ruling that petitioner had shown cause and prejudice for failure to have raised in his Illinois appeal, the issue of trial counsel's ineffectiveness. Id. at 802.

Here, too, denial of a full review of defendant's constitutional claims is "prejudice" within the above standard.

Under these circumstances, certificate of appealability should have been allowed so that defendant could obtain federal review of his federal constitutional claims - in a setting

where he claims actual innocence.[5]

III. The Court of Appeals should have granted certificate of appealability to review the District Court's dismissal of defendant's habeas petition raising the above issues.

The litany is that a defendant is not entitled to a perfect trial, only to

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[5] Defendant has a colorable claim of actual innocence. This is a case where an innocent man may remain imprisoned due to "technical difficulties." The constitutional violations claimed impact on the reliability of the trial. Can one feel confident about the result where the only eyewitness - to whom "all Chinese men are the same to me and I really cannot make the difference," (Tr. 36) - only could say that a photograph of defendant **resembled** the assailant (Tr. 35-49), and there remains a real possibility that defendant's admission was unreliable because coerced? A statement is considered involuntary, and hence inherently unreliable, if it is the result of psychological coercion. Spano v. New York, 360 U.S. 315, 3 L.Ed.2d 1265 (1959); Lynumn v. Illinois, 372 U.S. 528, 9 L.Ed.2d 922 (1963). See App. E, App. 40-44 & App. 53-57 re coercion in this case.

a fair one. This defendant did not have a fair trial.

What's worse, he has not yet had a judicial decision on the merits of his viable constitutional claims that were not raised on direct appeal in the State court due to ineffective assistance of counsel in the State trial and appellate courts.[6]

The determination (by the State courts) that his Illinois Post-

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[6] The most notable of those constitutional claims, as to which defendant never received judicial review on the merits - State or federal - due to defective representation by counsel, involves defendant's purported incriminatory statements. To demonstrate the viability of these constitutional claims in this case - which also supports our position that defendant has a colorable claim of actual innocence - we attach as App. E, App. 34-57, an excerpt from the Petition for Certificate of Appealability filed in the 7th Circuit, No. 98-2294.

Conviction Petition - finally raising these issues - was untimely, operated to preclude federal habeas review of the merits of his constitutional claims.

The machinery of justice may not always run smooth, but it should not be allowed to grind to a halt on account of a thoughtless lawyer.

Given the viability of the constitutional claim as to which certiorari review is sought here (federally guaranteed right to counsel includes right to be notified of result of direct appeal), as demonstrated above - as a result of which defendant lost his opportunity to have his day in court in the federal habeas forum to review the merits of his constitutional claim that ineffective assistance of counsel

resulted in his unreliable statements being used against him, in a case where the sole eyewitness could not identity him and as to whom "all Chinese are the same" (Tr. 35) - defendant should have his day in court.

The instant decision should be reviewed on certiorari, as it conflicts with this Court's constitutionally-based and constitutionally-compelled decisions re citizens' right of access to the courts - especially in habeas matters.

The right of access to the courts is expansively construed, as it derives from the express constitutional "Bill of Rights" guarantee of "right to petition." California Transport v. Trucking Unlimited, 404 U.S. 508, 510-11, 30 L.Ed.2d 642, 646 (1972):

> "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See Johnson v Avery, 393 US 483, 485, 21 L 2d 718, 721 . . . ."

In Johnson v. Avery, 393 U.S. 483, 485, 21 L.Ed.2d 718, 721 (1969), this Court stated:

> "This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme, and the Congress has demonstrated its solicitude for the vigor of the Great Writ. The Court has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.' Bowen v Johnston, 306 US 19, 26, 83 L Ed 433, 461, 59 S Ct 442 (1939)."

This Court continued - and it is this principle that we claim has been trashed in this case:

> "Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the

> courts for the purpose of presenting their complaints may not be denied or obstructed." 393 U.S. at 485, 21 L.Ed.2d at 721.

Denying defendant a certificate of appealability in this case, denies him the right of access to the courts - here, for federal habeas review of his State conviction - in violation of the above holdings of this Court.

Due process forbids selective treatment of litigants. "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem." Griffin v. Illinois, 351 U.S. 12, 16, 100 L.Ed. 891, 897 (1955).[7]

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[7] At this point in the Griffin opinion, the following footnote appears:

> "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the

(continued...)

All litigants, rich or poor, powerful or powerless, are entitled to uniform justice. Griffin v. Illinois, supra (indigents entitled by due process to free transcripts so they can attack their convictions).[8] All are equally entitled to access to the courts. Johnson v. Avery, 393 U.S. 483, 21 L.Ed.2d 718 (1969).

There is no rational reason for the law to treat individuals who wish to

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[7](...continued)
mighty: *but* in righteousness shalt thou judge thy neighbor." Leviticus, ch 19, v 15, as quoted by this Court in Griffin v. Illinois, 351 U.S. 12, 16 n.10, 100 L.Ed. 891, 897 n.10 (1955). (Emphasis in Griffin.)

[8] In Griffin, this Court upheld petitioners' rights to appellate review of their convictions, which review had been denied because they could not afford to pay for transcripts of their trials.

appeal from orders denying habeas corpus, differently from those who appeal from other kinds of adverse orders as a matter of right.[9]

CONCLUSION

Certiorari should be allowed.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

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[9] E.g., 28 U.S.C. 1291 - appeals as of right, from final orders of U.S. district courts, lie in the U.S. courts of appeals.

It is also problematic whether the procedure whereby a person whose habeas petition is denied must first obtain a certificate of appealability in order to obtain appellate review, while a State can appeal a grant of habeas as a matter of right without such certificate, would withstand an "equal protection / equal right of access to the courts" challenge. We respectfully submit that the provision so requiring - F.R.App.P. 22(b) - is unconstitutional for that very reason, and this Court may wish to address it sua sponte in the interests of justice though not raised below.

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel.
TOM U. CHOE,

Petitioner,

v.

JERRY GILMORE,

Respondent.

97 C 1005
Judge George W. Lindberg

Dated: FEB. 13, 1998

MEMORANDUM OPINION AND ORDER

Tom Choe has petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. On August 18, 1987, Choe shot and killed Julio Aguirre in Chicago. In October 1989, a jury found Choe guilty of Aguirre's murder after a trial in the Circuit Court of Cook

County. Judge Thomas P. Durkin sentenced him to 60 years in prison. Choe appealed, claiming that the trial court erred when it: denied his motion to suppress statements he made at the police station, admitted an eyewitness' statements [sic.] and that permitted the State to question Choe about his gang affiliation and activities. People v. Choe, 595 N.E.2d 99, 101-102, 172 Ill.Dec. 36, 38-39 (Ill.App.1st 1992) The appellate court affirmed Choe's conviction in an unpublished order. Id. Choe then filed a petition under the Post-Conviction Hearing Act after the limitations period had expired,[1]

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[1] The limitations period for filing post-conviction petitions is three years from conviction or six months after the denial of a petition for leave to appeal

asserting a lack of culpable negligence for his [p. 2] tardiness. He alleged that his trial counsel had been ineffective for 1) failing to move to suppress statements defendant made prior to his Miranda warnings; 2) failing to move to suppress statements he claimed were coerced; 3) failing to proffer proper jury instructions; 4) failure to represent relevant facts and law as to the Fourth Amendment seizure issue; 5) failure to call an alibi witness; and 6) failing to object to the excessiveness of the sentence. Choe also raised the

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or the date for filing such a petition if none is filed, whichever is later. 725 ILCS § 5/122 (1997). The Illinois Appellate Court affirmed Choe's 1989 conviction in May 1992. He did not seek leave to appeal to the Illinois Supreme Court.

issues of ineffective assistance of appellate counsel for failing to address trial counsel's deficiencies and for failure to notify him that his conviction was affirmed, which resulted in his failing to file a timely post-conviction petition.[2]

The trial court denied the petition without a hearing and Choe appealed. The Illinois Appellate Court affirmed, holding that the petition was not timely filed and that "defendant's professed lack of knowledge that his conviction was affirmed (was) insufficient to establish a lack of culpable negligence" for failing to meet the deadline. The court also considered the merits of

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[2] Choe's trial counsel also represented him--along with co-counsel--on appeal.

Choe's claims of ineffective assistance of counsel regarding 1) failure to present a motion to suppress; 2) failure to argue that defendant was "seized" before his arrest; 3) failure to tender proper jury instructions; and 4) failure to present ineffective assistance at trial as an issue on appeal. As to each claim, the court held that no constitutional violation had occurred. Stating that they had [p. 3] been listed but not elaborated upon, the appellate court declined to address the merits of petitioner's claims that counsel was ineffective for 1) failing to move to suppress statements made prior to Miranda warnings; and 2) to present proper law on the voluntariness of defendant's accompanying police to the

station. It also did not address petitioner's claims that trial counsel failed to call an alibi witness or object to the excessiveness of Choe's sentence, arguments petitioner had also listed without further discussion or support. The Illinois Supreme Court denied leave to appeal. Choe subsequently filed the instant habeas petition, raising the ineffective-assistance of counsel issues included in the post-conviction petition.

The court must evaluate this habeas petition according to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. It may not grant relief for claims that a state court has adjudicated on their merits unless that adjudication:

> 1) resulting in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court; or
>
> 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in" the state court proceeding.

28 U.S.C. §2254(d). Under the new habeas statute, a state appellate court's factual summary is presumed correct unless the [p. 4] petitioner rebuts it with clear and convincing evidence. 28 U.S.C. §2254 (e) (1).

Respondent, Warden Jerry Gilmore, argues that petitioner has procedurally defaulted on his claims because "of his failure to present them in his state court proceedings as independent bases for relief." The doctrine of procedural default requires that the constitutional claims a petitioner raises in his habeas petition were fairly presented during the state court proceedings so that the state courts had the opportunity to address their merits. Momient-El v. Detella, 118 F.3d 535, 538 (7th Cir.), *cert. denied* 118 S.Ct. 448 (1997). A federal court is barred from considering constitutional issues if a petitioner did not raise them during the state proceedings. Id. In support of the contention that petitioner has defaulted

on his constitutional claims, respondent states that in the appeal from the trial court's denial of post-conviction relief, petitioner asserted his constitutional claims only as "a basis to challenge the summary dismissal of his post-conviction petition" without a hearing. Therefore, respondent concludes, when petitioner argued to the appellate court that his constitutional claims warranted a hearing, he was not presenting the constitutional issues themselves for consideration and thereby waived them.

The court finds that petitioner's presentation of his constitutional issues in his appeal of the summary dismissal of his post-conviction petition sufficiently raised those

issues to avoid procedural default on that basis. As petitioner points out, an [p. 5] appeal from summary dismissal of a post-conviction proceeding requires the petitioner to establish that such dismissal was inappropriate because the alleged facts were sufficient to at least warrant a hearing on the constitutional issues. The state court did address the merits of some of petitioner's constitutional issues, indicating that it considered those issues raised. The appellate court did not find that petitioner's claims were defaulted on the basis respondent suggests.

However, petitioner's protestations that if procedural default can be found in this case "`the law is an ass, a

idiot,'"[3] ignores that the Illinois Appellate Court clearly held that petitioner's claims were defaulted on a separate basis. "There is another reason to affirm the trial judge's summary dismissal of the post-conviction petition. The defendant's petition was not timely filed." When a petitioner does raise constitutional issues in state proceedings but the state court rejects the petition because of petitioner's violation of state procedural rules, a federal court is barred from reviewing the claims. This is because the state court's decision rests on "independent and adequate state

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[3] Quoting Mr. Bumble from DICKENS, OLIVER TWIST ch. 51, in BARTLETT'S FAMILIAR QUOTATIONS 469:12 (16th ed. 1992).

law grounds. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1991). Such a state law determination cannot have "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court" as required under 28 U.S.C. [p. 7] § 2254(d). In addition, the Illinois Appellate Court offered a second basis for dismissal as to several of the claims: although they were listed as issues, there was no further argument or explanation in support of them.[4] Therefore, the court

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[4] As noted above, the appellate court declined to address the merits of petitioner's claims that counsel was ineffective for 1) failing to move to suppress statements made prior to Miranda warnings; and 2) to present

held that in addition to the entire petition being untimely, these specific claims were not sufficiently raised to be addressed at all.

It matters not that the appellate court addressed the merits of the remaining claims when it also plainly stated that the claims were untimely under Illinois law.[5] "(A) decision to

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proper law on the voluntariness of defendant's accompanying police to the station. It also did not address petitioner's claims that trial counsel failed to call as an alibi witness or object to the excessiveness of Choe's sentence.

[5] The appellate court reviewed the following claims of ineffective assistance of counsel: 1) failure to raise a fourth amendment claim as to defendant's presence at the police station; 2) failure to present a fully prepared motion to suppress; 3) failure to tender proper jury instructions; and 4) failure to present an ineffective assistance claim on appeal.

reach federal claims only in the alternative still acts as a bar to federal review of the merits." Tyson v. Trigg, 883 F.Supp. 1213, 1220 (S.D.Ind. 1994), *aff'd* 50 F.3d 436 (7th Cir. 1995), *cert. denied* 116 S.Ct. 697, 133 L.Ed.2d 655 (1996). "The rationale for this rule is that federal review would be superfluous if an independent basis exists under state law." Id. (citing Coleman v. Thompson, 501 U.S. 722, 725-31, 111 S.Ct. 2546, 2552-54 (1991).

The prudence of the procedural default doctrine that federal courts must follow becomes apparent when examining the procedural [p. 7] history of this case. Because petitioner is alleging that his counsel was

ineffective at both the trial and appellate levels, his instant claims were not raised until he filed his petition for post-conviction relief. The trial court summarily dismissed this petition without comment. The Illinois Appellate Court did not address the arguments that it held were inadequately briefed. In short, although petitioner claims that he previously raised all of the issues in the instant habeas petition before the Illinois courts, most of his claims have never been addressed at all in a state court. The doctrine of procedural default that federal courts must follow is intended to avoid such a situation: alleged constitutional violations in state court proceedings that are raised for the

first time in a federal habeas proceeding. Granting review here would defeat the purpose of such rules, which is to provide state courts that opportunity to correct errors within their own system before federal courts are asked to do so.

Perhaps anticipating this outcome, petitioner raises as an issue in the instant petition that he was not "culpably negligent" for failing to file a timely post-conviction petition because his appellate counsel failed to inform him that his conviction was affirmed. Again, whether a petitioner was culpably negligent for failing to file a timely petition is a question of state law interpretation and improper for federal court review. Barksdale v.

Lane, 957 F.2d 379, 383 (7th Cir. 1992); 725 ILCS 5/122-1 (statutory deadlines must be met "unless the petitioner alleges facts showing that the delay was not due to his culpable [p. 8] negligence.") As to petitioner, the Illinois Appellate Court held that "(d)efendant's professed lack of knowledge that his conviction was affirmed is insufficient to establish a lack of culpable negligence." Illinois courts have consistently applied the statutory deadlines to untimely post-conviction petitions. See Harris v. DeRobertis, 932 F.2d 619, 622 (7th Cir. 1991) (noting that in more than 40 years, "the Illinois courts have failed to produce even a single published opinion in which the court found a lack

of culpable negligence"). As a second matter, this issue is not one of constitutional dimension. There is no constitutional right to counsel beyond the first appeal of right. Ross v. Moffit, 417 U.S. 600 (1974) (no right to counsel in discretionary state appeal). Therefore, allegations that counsel was ineffective during post-conviction proceedings are therefore barred in federal habeas corpus proceedings. 28 U.S.C. § 2254(i).

It may be that in claiming that he was not culpably negligent--as noted, a state law concept--petitioner was attempting to argue that he had "cause" for default, which is indeed a federal habeas law concept.

> "In all cases in which a state prisoner has defaulted his

> federal claims in state court pursuant to an independent and adequate state procedural rule federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750, 111 S.Ct. at 2565.

If so, this argument would not be convincing. Petitioner's only proffered reason for his untimeliness is his counsel's failure to inform him that his conviction was affirmed. As petitioner had no [p. 9] right to counsel at that time, this does not amount to "cause," which requires an external objective factor such as "interference by officials or the unavailability of the factual or legal basis of a claim" to

have impeded a petitioner's compliance with state procedural rules. Barksdale, 957 F.2d at 385 (citing Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986). Without a showing of cause, the court need not consider whether petitioner was "prejudiced" by any alleged constitutional violation. Id. at 386.

ORDERED: For the aforementioned reasons, Tom Choe's petition for a writ of habeas corpus is denied.

ENTER:

_____
George W. Lindberg
District Judge

DATED: FEB 13 1998

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel.
TOM U. CHOE,

Petitioner,

v.

JERRY GILMORE,

Respondent.

97 C 1005
Judge George W. Lindberg

Dated: MAY 19, 1998

MEMORANDUM OPINION AND ORDER

Petitioner, Tom Choe, has filed a petition for a certificate of appealability after this court denied the habeas corpus petition Choe filed pursuant to 28 U.S.C. §2254. See 28 U.S.C. §2253(c)(1)(A). The court may issue a certificate of appealability

"only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2).

In its previous order, the court dismissed petitioner's habeas petition as procedurally defaulted because the Illinois Appellate Court had held that Choe's post-conviction petition was untimely and that he could not establish a lack of culpable negligence for it being so. The appellate court also briefly reviewed the merits [p. 2] of four of petitioner's eight claims for relief.[1] Petitioner now claims that

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[1] The appellate court also held that two of the four remaining claims were listed but not elaborated upon and would not be considered. The court did not refer to the final two claims at all.

this court erred when it declined to address the merits of those four claims. He also maintains that the court disregarded his assertion that he established cause and prejudice for his untimely post-conviction petition and resulting procedural default and that he should have been allowed a habeas hearing to demonstrate such cause. Petitioner's averred cause for his default is that appellate counsel failed to notify him that his conviction was affirmed and that as a result he was unaware of the deadline for his post-conviction petition. Although the court held that this claim did not raise a constitutional issue because there is no right to counsel after the first appeal, petitioner claims that his right to

counsel on appeal extends through the disposition of that appeal so that a defendant may determine what further action to take.[2]

The court is not persuaded by this argument, which is merely an attempt to extend the right to counsel further than the [p. 3] constitution requires. Effective assistance of appellate counsel requires "winnowing the potential claims so that the court may focus on those with the best prospects." *Mason v. Hanks,* 97 F.3d 887, 893 (7th Cir. 1996) (quoting *Page v. United*

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[2] Petitioner now claims that the failure of any state agency to send him notification of the denial of his appeal constitutes a denial of due process. As this argument was not previously raised, the court will not consider it now.

States, 884 F.2d 300, 302 (7th Cir. 1989)). The question of whether counsel's ineffectiveness prejudiced the defendant focuses on whether the outcome of the appeal itself--not that of a subsequent post-conviction procedure--would have been different. *Id.* (petitioner must show that the result of the appeal is unreliable).

Petitioner also cannot establish that counsel's failure to notify him of the affirmance prejudiced him in the post-conviction proceedings. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984) (defendant must show that counsel's deficient performance prejudiced the defense). In his post-conviction petition, petitioner raised eight issues. The Illinois Appellate

Court refused to address four of them, stating that they were not adequately briefed. This procedural default cannot be attributed either to appellate counsel's failure to notify petitioner or to the untimeliness of the petition but only to counsel handling the post-conviction petition. The appellate court briefly addressed the remaining four issues and found no constitutional violations. Although this court declined to address those issues because the [p. 4] Illinois Appellate Court held that the petition was untimely, a review of their merits now finds no error that would entitle petitioner to a certificate of appealability. In his post-conviction petition, petitioner claimed that counsel was ineffective for

failing to: 1) present a motion to suppress coerced statements; 2) argue that defendant was "seized" before his arrest; 3) tender proper jury instructions; and 4) present ineffective assistance at trial as an issue on appeal.

As to petitioner's claim that counsel failed to present a motion to suppress, the appellate court found that this was a strategic decision with which petitioner concurred and did not amount to ineffective assistance. Although petitioner stated that his counsel did not present "crucial testimony" regarding whether he was seized when he accompanied police to the station, the trial court considered evidence relevant to this issue. The appellate court found

that the result would not have differed even if the additional evidence had been admitted. The court also held that the jury instructions petitioner asserted trial counsel should have proffered would not have changed the result of the trial and therefore could not have caused petitioner any prejudice. Because the court found that trial counsel had not been effective [sic.] as to [p. 5] these issues, it also held that appellate counsel was not ineffective for failing to raise them.

As to each of these claims, the court holds that the Illinois Appellate Court's ruling did not result in a decision that: 1) was contrary to, or involved an unreasonable application of, clearly established federal law as

determined by the U.S. Supreme Court; or 2) was based on an unreasonable determination of the facts in light of the evidence presented in" [sic.] the state court proceeding.

For the foregoing reasons, the court denies the petition for a certificate of appealability.

ENTER:

George W. Lindberg
District Judge

DATED:MAY 19, 1998

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted: July 30, 1998
Date: August 6, 1998

Before

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

TOM U. CHOE,
Petitioner—Appellant,

No. 98-2294 v.

JERRY D. GILMORE,
Respondent-Appellee

Appeal from the United
United States District Court for
the Northern District of
Illinois, Eastern Division.

No. 97 C 1005

George W. Lindberg, Judge.

Petitioner filed for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The district court denied the petition and declined to issue a certificate of appealability. Petitioner has now filed an application for a certificate of appealability in this court. Fed. R. App. P. 22(b); Cir. R. 22.1.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). Accordingly, the application for a certificate of appealability is **DENIED**.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 25, 1998

HON. JOEL M. FLAUM, Circuit Judge

HON. MICHAEL S. KANNE, Circuit Judge

HON. TERENCE T. EVANS, Circuit Judge

UNITED STATES OF AMERICA,
ex rel. TOM CHOE,

Petitioner-Appellant,

No. 98-2294 v.

JERRY GILMORE,

Respondent-Appellee.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.

No. 97 C 1005
Milton I. Shadur, Judge
[note: This is an error in the Order.
The District Judge was George W.
Lindberg.]

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled case on August 28, 1998, by petitioner-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby **DENIED.**

APPENDIX E

Excerpt from Petition for Certififate of Appealability filed in 7th Circuit, No. 98-2294, pages 15-25

[a portion of App. C to Petition for Rehearing and Suggestion for Rehearing En Banc]

[p. 15] **NO PRESUMPTION OF CORRECTNESS attaches to any State court determination re EFFECTIVE ASSISTANCE OF COUNSEL.**

> "[W]e consider all questions of law de novo. Factual issues that have been determined by the state trial or appellate courts are presumptively correct." Montgomery v. Greer, 956 F.2d 677, 680 (7 Cir. 1992).

At bar, the issues presented as to ineffective assistance of counsel, are questions of law; there are no factual issues entitled to the presumption of correctness. "A district court's findings that counsel's performance was reasonable and that the alleged errors

did not prejudice the defense are 'mixed question of law and fact' . . . [*citing* Strickland v. Washington, 466 U.S. 668, 698, 80 L.Ed.2d 674 (1984)] and therefore subject to our **independent review.**" United States ex rel. Simmons v. Gramley, 915 F.2d 1128, 1133 (7 Cir. 1990) (Emphasis added.) "We consider a claim of ineffective assistance of counsel by examining 'the totality of the circumstances...'" Ibid., quoting United States v. Muehlbauer, 892 F.2d 664, 668 (7 Cir. 1990).

SUBSTANTIVE CLAIMS

I. Trial counsel rendered ineffective assistance of counsel - in each and all of the following particulars:

Counsel (1) failed to proceed effectively with respect to [p. 16]

defendant's statements[14]; (2) failed to present an available alibi witness; and (3) failed to raise the excessiveness and unconstitutionality of defendant's sentence.

1. **Failure to proceed effectively re defendant's statements.**

The sole reliable evidence connecting defendant to the homicide was defendant's statements. The admission of these statements was prejudicial, because the only other evidence was testimony of Gloria Santiago, who said, "all Chinese men are the same to me and I really cannot make the difference" (Tr. 36), and that defendant's picture resembled an assailant. (Tr. 35-49)

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[14] In four specific ways, as particularized and elaborated below.

There were two statements. The first, made when defendant was first taken to the police station, before he was given Miranda warnings, is referred to as Statement I. The second statement is referred to as Statement II.

A. Counsel rendered ineffective assistance when he failed to move to suppress defendant's statement that was used as a basis for finding probable cause, and was made by defendant while he was in custody without having been given Miranda warnings.

Both the trial court (Tr. 87) and the Appellate Court (595 N.E.2d at 102) found there was probable cause based upon defendant's initial oral statement given while in the police station. This statement of defendant was used by the State in final argument. This statement was obtained while defendant was [p. 17]

"in custody."[15] He was brought to the police station by police. He was not questioned where he was originally located. He was a prime suspect. He was away from his family. In the police station, he was in a small, closed room. He had been with the police a total of approximately one hour. The police report in this regard reads:

> "On 29 September 1987, 3rd Watch, R/Dets went to Gang Crimes North and conferred with GCSs Vukonich and Raymond. Based on the tentative identification made by Gloria Santiago, it was determined that the next course of action should be to interview Tom U. Choe, in the Office of Area 5 Violent Crimes, in regards to the Homicide. Several hours

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[15] The habeas court must make an independent determination on this issue (re "custody" and "seizure"). Thompson v. Keohane, 516 U.S. 99, 133 L.Ed.2d 383 (1995).

> later, Tom U. Choe voluntarily accompanied the Arresting Officers, to Area 5, to be interviewed. (C 19)

At this time, without Miranda warnings being given, defendant made statement I in response to a police statement to him. See Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed.2d 297 (1980).

He was "in custody." Thompson v. Keohane, 516 U.S. 99, 133 L.Ed.2d 383, 394 (1995). This statement must be suppressed.

Counsel was ineffective for not moving to suppress on the basis that defendant was in custody and no Miranda warnings were given. Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d 305 (1986). This was not a reasonable strategy decision, because counsel desired to suppress defendant's

statements.

B. Trial counsel rendered ineffective assistance because he failed to proceed with a hearing on the motion to suppress defendant's Statement II on the basis that it was obtained by coercion in violation of defendant's 5th and 6th Amendment constitutional rights. [p. 18]

Defense counsel failed to proceed with a hearing to suppress defendant's statement II on 5th and 6th Amendment grounds, although such motion was filed, see R. 453-57, and defendant's testimony was available to support this assertion. Defendant testified before the jury that his statement was false, having been made due to coercion and promises. (Tr. 283) He testified that he was threatened that he would be sent back to Korea if he did not give a statement (Tr. 290-91, 294), that the police

applied pressure by continuing to push his head against the wall (Tr. 290-91), and that he was isolated and not permitted to see his family (Tr. 291), and was refused permission to call his family (Tr. 291, 294), and told that if he gave a statement, he would be permitted to go home (Tr. 294); that he signed what he signed because of what the police told him. (Tr. 304) This testimony, and the assertion in the motion that was made-but not proceeded on, sets out that **any statement obtained from the defendant was obtained involuntarily and was coerced from the defendant**, and hence, was obtained in violation of his 5th and 6th Amendment rights per the U.S. Constitution.

Under controlling U.S. Supreme

Court precedents, the circumstances surrounding the obtaining of defendant's statements demonstrate that the statement was involuntary and coerced; as such, the statements should have been suppressed, and would have been suppressed, if counsel had properly proceeded on the motion he did file.

A statement is considered involuntary, and hence inherently [p. 19] unreliable, if it is the result of psychological coercion. Spano v. New York, 360 U.S. 315, 3 L.Ed.2d 1265 (1959); Lynumn v. Illinois, 372 U.S. 528, 9 L.Ed.2d 922 (1963).

Where defense counsel prepared the motion to suppress and the affidavit in support thereof, and/or elicited from the defendant testimony of the coercion

(before the jury), **but never caused this matter to be presented to the trial court** for a determination as to whether the statement was unconstitutionally obtained and hence inadmissible, counsel rendered ineffective assistance under the 6th and 14th Amendments to the U.S. Constitution. Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d 305 (1986); see Moffett v. Kolb, 930 F.2d 1156 (7 Cir. 1968).

It is not enough for the court, in denying collateral relief, to assert this was a "tactical" decision. Considering the probability of success of a motion to suppress as above, counsel's failure so to proceed here is patently unreasonable.

> "[W]e wish to emphasize . . . that the mere

> incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactic must be ***reasonable*** under the circumstances." Cave v. Singletary, 971 F.2d 1513, 1518 (11 Cir. 1992). (Emphasis in original.)

Accord, Harris v. Reed, 894 F.2d 871, 878 (7 Cir. 1990).

Surely, when "tactical decision" is raised as a defense for a lawyer failing to proceed, a court must hold a hearing as to the basis for any such tactical decision, to insure that the term is not used as a coverup for counsel blundering. Strickland v. Washington, supra, 466 U.S. at 691, 80 L.Ed.2d at 695-96. [p. 20]

C. Although defense counsel moved to suppress defendant's statement on the basis that defendant was illegally seized in violation of his 4th Amendment rights, counsel was

ineffective for failure to (i) know and present the relevant law, and (ii) present relevant facts.

Here, counsel's action when he trial to suppress defendant's statement on 4th Amendment grounds demonstrates he did not present evidence that defendant was seized, because he did not know that such evidence was necessary. The following occurred at the conclusion of the hearing on the motion:

> "The Court: Where was the Defendant arrested?
>
> Mr. Burch: It is our position that he was arrested at the restaurant.
>
> The Court: What evidence is there of that?
>
> Mr. Burch: The fact that he was taken away from the restaurant.
>
> The Court: The only evidence here from your witnesses, forgetting about

the officer, the officer says he arrested him <u>after</u> he made a statement, a spontaneous declaration in the police department, your witnesses have testified that the police came. Left a card, said they wanted to speak to him. That they came back. That **he left with them** to answer some questions.

Mr. Burch: Right.

The Court: Without being handcuffed. Without any evidence whatsoever and after all it is your burden on this case.

Without any evidence whatsoever of any coercive conduct on the part of the police which actually surprised me because it is very unusual that a defendant would be that frank in this type of a circumstance.

Mr. Burch: Your Honor, it is our position that at the time that they took him away for the purposes of investigation, interrogation or any other process, that this was, in effect, an arrest. [p. 21]

But in any event --" (Tr. 74-75) (Emphases added.)

Of course, merely stating defendant's position, as thus expressed by counsel, is not sufficient, where counsel does not present the evidentiary FACTS that show defendant was seized.

Counsel did not present crucial evidence that proved seizure. That evidence was:

(1) defendant was nineteen years old;

(2) two officers brought defendant from the restaurant to the police station;

(3) the officers were armed and their guns were seen by defendant, even though the guns were not pulled out;

(4) the officers believed defendant was a suspect in a murder;

(5) the officers told defendant he was a suspect;

(6) these were officers whom defendant had seen at a police station

when he had previously been arrested;

(7) at the restaurant, the police stood in close proximity to defendant - one at his side and one in front of him - so as to cause him to feel he was not free to leave, that is, seized;

(8) he was placed in a locked police car;

(9) once defendant was in the police car, they sat with one officer driving and one officer in the back seat next to defendant;

(10) the police drove defendant around in this locked police car for one-half hour;

(11) the police walked defendant into the police station, one at his side and one behind him;

(12) defendant was not told he was free to leave;

(13) defendant was placed in a small room used for interrogating suspects;

(14) he was not interviewed in an open area where witnesses wait; [p. 22]

(15) the room had no windows; it had one door; there was a "ring" on the wall;

(16) the door to the room was locked;

(17) he was kept in this locked room for twenty minutes to one-half hour before being questioned;

(18) then, two other officers came in and told him he was to be placed in a line-up. (C. 38-40)

The officers who had contact with defendant and who transported defendant and who put him in a room, were not called. At the motion hearing, defendant himself was not called to testify to facts that would have demonstrated he had been "seized" and/or arrested in violation of his 4th Amendment rights.[16]

On this issue of whether defendant was seized, this court must make an

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[16] Because of this, the trial court expressly stated that the defense presented no evidence of defendant's seizure. (Tr. 74)

independent determination. Thompson v. Keohane, 516 U.S. 99, 133 L.Ed.2d 383 (1995); Ornelas v. United States, 517 U.S. 690, 134 L.Ed.2d 911 (1996).

Under the test for **whether a person has been seized** within the meaning of the Fourth Amendment - i.e., **whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave**, Michigan v. Chesternut, 468 U.S. 567, 100 L.Ed.2d 565 (1988) - if relevant facts were presented, the evidence would demonstrate defendant was seized. See, e.g., Dunaway v. New York, 442 U.S. 200, 207 n.6, 60 L.Ed.2d 824, 832 n.6 (1979); United States v. Ceballos, 812 F.2d 42, 48 (2 Cir. 1987). Because of this [p.

23] evidence, the prosecution could not prove that defendant's presence while going to the police station and at the police station was consensual. Florida v. Royer, 460 U.S. 491, 75 L.Ed.2d 229 (1983).[17]

The evidence demonstrating that defendant was seized was not presented at the hearing on the motion to suppress - not for any tactical reasons, but because defense counsel did not know the relevant law. This is evident from his unsuccessful attempts to present this

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[17] "[W]here the validity of a search [or seizure] rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." 75 L.Ed.2d at 236.

evidence where it was irrelevant - at trial. (See Tr. 156-60, 204-07, 213-17.) Failure to know the law is ineffective assistance of counsel. Young v. Zant, 677 F.2d 792 (11 Cir. 1982); Gaines v. Hopper, 575 F.2d 1147 (5 Cir. 1978).

Counsel's failure to present relevant evidence and law which would have resulted in suppression of the only real evidence of his guilt deprived defendant of effective assistance of counsel, because (a) there was no strategic reason not to present such evidence, (b) if it had been properly presented, the result would have been different, i.e., the court would have found defendant was in custody, and (c) if matters had been properly presented,

the motion to suppress would have been sustained. Defendant was denied effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d 305 (1986). [p. 24]

D. Defense counsel rendered ineffective assistance when he failed to insure that the jury was properly instructed on how to evaluate an alleged statement of defendant, after defendant presented evidence that that statement was untrue because it was coerced.

Although defense counsel did not proceed before the trial court at a pre-trial hearing upon the assertion that defendant's statement was coerced, he presented such evidence to the jury. (Tr. 283-94, 304) The Illinois Supreme Court has prescribed an appropriate instruction, I.P.I. Crim. No. 3.06-3.07, which reads:

"3.06-3.07 **Statements by Defendant**

> You have before you evidence that [(the)(a)] defendant made [a] statement[s] relating to the offense[s] charged in the [(indictment)(information)(complaint)]. It is for you to determine [whether the defendant made the statement[s], and, if so,] what weight should be given to the statement[s]. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made."[18]

It has been held to be ineffective assistance not to have the jury so instructed. People v. Brinson, 80 Ill.App.3d 388, 399 N.E.2d 1010 (2 Dist.

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[18] The Committee Note to this instruction includes that "The bracketed phrase in the second sentence should be deleted only when the defendant admits making all the material statements attributed to him."

1980).[19] This instruction is specifically [p. 25] designed to allow the jury to determine not to consider against a defendant, a statement that the jury finds was coerced from him. Defense counsel failed to tender this instruction. (Tr. 345-48)

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[19] Brinson held counsel ineffective for failure to request an instruction pursuant to I.P.I. 3.07, for without such instruction, the jury was left without proper guidance how to consider the statement. Id. at 1014. The Appellate Court in Brinson found no strategic basis for failure to request this instruction, and that the failure amounted to ineffective assistance of counsel. Ibid. More specifically:

> "The failure to make such motions under the circumstances prevailing here indicates a fatalistic acceptance of the defendant's guilt or a lack of faith in his credibility, either of which fatally impairs any effective representation and is tantamount to no representation at all." Ibid.

Presenting to the jury evidence of coercion and unreliability of defendant's statement was meaningless unless the jury was also instructed as per I.P.I. Crim. No. 3.06-3.07, which advises them how to evaluate such evidence. Counsel is ineffective for failure to request an instruction pursuant to I.P.I. 3.07. Brinson, supra.

Although a trial court has ruled that a defendant's statement is admissible and was not unconstitutionally obtained, the defendant still has a right to present to a jury, evidence that violence or other improper or coercive activities by the police render the confession unreliable. This is a federally

protected constitutional right of the defendant, which is part and parcel of his right to present a defense. Crane v. Kentucky, 476 U.S. 683, 690, 90 L.Ed.2d 636, 645 (1986).

Here, presenting this evidence to the jury without an instruction how it should be considered, was ineffective assistance.